IN THE SUPREME COURT OF THE UNITED STATES

No. 04-104 (20)

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-105 (19)

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LODGING

LODGING
Estimate of Number of Cases Possibly Impacted by the Blakely Decision

[See Attached Service Lists]

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October 8, 2004

M E M O R A N D U M

To: Tim McGrath

From: Lou Reedt

Date: July 20, 2004

Subject: Estimate of Number of Cases Possibly Impacted by the Blakely Decision

The decision in Blakely v. Washington has the potential to impact both the court workload and defendant sentences. This estimate below uses the FY02 Commission dataset to identify the number of cases having sentencing enhancements that might be affected by the Blakely decision. At this time, it is not possible to estimate the magnitude of the impact, if any, on offender sentences however, data is being collected to address this question.

It is difficult to estimate with certainty the potential number of defendants affected by the decision in Blakely as well as what the effect might mean for the court workload. While a large number of cases may, at first blush, appear to be exposed to a Blakely effect, it is likely that far fewer cases will actually be affected because most cases result in pleas accompanied by plea agreements which may contain stipulations of facts, such as quantity of drugs or dollar loss amounts, applicability of guideline enhancements, or Blakely waivers. Consequently early estimates may be substantially over inclusive.

As a cautionary note, during this initial unsettled period it should be expected that the new uncertainty may affect the workload of the court community. It can be expected that in the longer term, either solutions to 'fix' the problem will be employed where available and where not available, a return to preguideline pleading practices (which would be consistent with current state court practice) will return. Consequently making long term estimates on the currently available information may substantially overestimate the ultimate impact.

In FY02 64,366 cases were sentenced under the federal sentencing guidelines. Of these, we have complete sentencing information on 52,312. The following analysis is limited to these 52,312 cases. An initial estimate of the possible impact identified all cases having a chapter 2 or 3 sentence enhancement, an upward departure, or a cross reference application.[1] Of the 52,312 cases with complete sentencing data, 44.2 percent (n=23,138) met any of these criteria. A substantial proportion of the remaining 29,174 cases involved drug trafficking offenses (n=17,430). The proportion of these remaining cases potentially exposed to a Blakely effect because the offenders base offense level was increased beyond the quantity specified in the plea or indictment may be estimated by eliminating from consideration those offenders who had an applicable mandatory minimum and a base offense level that identically corresponds to the relevant mandatory minimum (for this analysis, cases were identified in which there was a mandatory minimum of 5 or10 years and a corresponding base offense level of 26 or 32, respectively). Using this criterion, 4,335 cases will not be affected. Additionally, it is understood that in border states many drug cases with non citizen defendants involve only the quantity of drugs found on the person when arrested - i.e., there is no additional drug quantity found through relevant conduct to increase the drug quantity above indictment/plea levels. Eliminating these cases removes an additional 2,257 cases from consideration. The remaining drug cases (n=10,838) are then added to the previous estimate of cases possibly affected resulting in an estimated total of 33,976 cases (65.0% of the 52,312 cases sentenced in FY02 with complete sentencing information available) potentially affected by Blakely.

As stated earlier, this estimate may substantially overstate the effect of the Blakely decision on the workload of the court community. In FY02, 97.1 percent of cases sentenced under the guidelines were the result of plea agreements. Of the 33,976 cases estimated above, 96.5 percent pled guilty. Two forms that a plea may take are relevant for consideration at this time: 1) pleas pursuant to Rule 11(c)(1)(c) that bind the court to a specific sentence; and 2) plea agreements fully stipulating the relevant sentencing factors in the case. For both of these forms of plea agreement, it is expected that the Blakely decision will have minimal or no effect. Current limitations in data collection do not include information specifying the form of the plea agreement, however the availability of these forms of plea agreement suggests that the above estimate overstates the actual impact.

Further reducing the number of possibly affected cases is that in federal circuits in which the federal guideline sentencing scheme is found to be constitutional there will be no impact whether the defendant is convicted at trial or regardless of what form a plea agreement may take. Until all circuit courts have ruled however the extent to which the previous estimate can be reduced cannot be determined. In circuits in which the guidelines are found to be unconstitutional, the proportion of defendants choosing to go to trial may increase above current levels but there is no evidence to suggest that the proportion of trial cases will not continue to account for a relatively small proportion of federal sentencings. The preguideline trial rate in federal cases was 12.6 percent (1988). While greater than the current trial rate of 3.8 percent, this figure indicates that trials, even absent the presence of the federal sentencing guidelines, accounted for a small percentage of the federal criminal court workload.[2] That there is a relatively small proportion of defendants choosing to go to trial is consistent with the experience of state courts. It has recently been reported that the trial rate in 22

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[1]**Guidelines 2L1.1, 2L1.2, 2L2.1, and 2L2.2 contain an enhancement if prior convictions are present. This specific offense characteristic was not used to identify cases for possible Blakely effect.**

[2]**This data on federal sentencing was reported in the Sourcebook of Criminal Justice Statistics, 2002, page 421, a Bureau of Justice Statistics publication base on data provided by the Administrative Office of the U.S. Courts. While Sentencing Commission data is available for 2002, it is not available for 1984. For consistency purposes it was determined that this Bureau of Justice Statistic data be used at both time points (1984 and 2002). It is noteworthy that Commission data report a lower trial rate in 2002 (2.9%).**

states has declined from eight percent of all court dispositions in 1984 to five percent of all dispositions in 2002.[3]

Finally, it is reasonable to assume that defendants who are cooperating with law enforcement, receiving a departure for providing substantial assistance to authorities under the federal guidelines, would have a greater likelihood of pleading guilty rather than going to trial. Among the estimated 33,976 cases cited above, 22.9 percent (n=7,764) received a departure for substantial assistance. This further lowers the estimated impact of the Blakely decision.

In conclusion, initial estimates of the impact of the Blakely decision on the workload of the federal court community should be viewed with caution. Activities occurring in this period immediately following the decision will likely not represent longer term responses by the field and cause substantial overestimation of the impact. While a large number of cases may, at first blush, appear to be exposed to a Blakely effect, it is likely that far fewer cases will actually be affected because of the availability of 'solutions' (*e.g.*, fully stipulated pleas, fully articulated indictments, waivers of Blakely, etc) in some courts or the likelihood that past practice will repeat itself (*i.e.*, historically high plea rates prior to the advent of the federal sentencing guidelines) in courts where these options are not available.

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[3]The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, Compiled by Marc Galanter. Prepared for the Symposium on the Vanishing Trial, sponsored by the Litigation Section of the American Bar Association, San Francisco, California, December 12-14, 1003.

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